Supreme Court Of The United States

October Term 1922

No. 463

GEORGIA RAILWAY AND POWER COMPANY et al.,
Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE TOWN OF DECATUR, Defendants in Error and Respondents in Certiorari.

FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

Reply Brief of Plaintiffs in Error and Petitioners in Certiorari.

L. Z. ROSSER,
J. PRINCE WEBSTER,
WALTER T. COLQUITT,
Attorneys for Plaintiffs in Error and Petitioners in Certiorari.

Johnson-Dallis Co., Printers, Atlanta, Ga.

SUBJECT INDEX.

TABLE OF CASES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

GEORGIA RAILWAY & POWER COMPANY, ET AL.,
Plaintiffs in Error and Petitioner in Certiorari,
vs.
THE TOWN OF DECATUR,
Defendants in Error and Respondents in Certiorari.

No. 463

REPLY BRIEF OF PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI.

I.

The contention of defendant in error (in its brief, pages 13 and 14) that the decision of the Supreme Court of Georgia, affirming the granting of an interlocutory injunction was a final adjudication, from which the writ of error should have been sued out, is not a motion to dismiss the bill of exceptions as there was no compliance with the provision of the sixth (6) rule of this Court.

The contention itself is without merit.

Southern Ry. Co. vs. Clift, Decision (No. 107) rendered December 4th, 1922.

The judgment of the trial court granting or refusing the temporary injunction, and the affirmance of such judgment by the Supreme Court of Georgia is not a final judgment or decree in the case.

Atlanta Trust & Banking Co. vs. Nelms, 119 Ga. 630 (1).

(1).

The only effect of such judgment is that points of law decided by the court are followed by the State court, in the subsequent trial of the case.

Atlanta Trust & Banking Co. vs. Nelms, 119 Ga. 630 (1).

(1).

The demurrers cannot be passed upon at such hearing.

Milltown Mfg. Co. vs. Bray & Co., 149 Ga. 151 (2).

Mack vs. Westbrook, 148 Ga. 691.

Bank of Soperton vs. Empire Trust Co., 142 Ga. 34, 35 (3).

A final judgment or decree is not rendered until the verdict and a final decree is entered thereon.

Georgia Code 5421.

Georgia Code 5500.

Southern Cotton Oil Co. vs. Overby, 136 Ga. 69 (3).

(2a) The court has no power to grant a final judgment or decree upon an interlocutory hearing.

Triumph Ice Machinery Co. vs. Sandersville Ice Co., 147 Ga. 468 (2).

Weaver vs. Bank of Bowersville, 146 Ga. 195.

Oostanula Mining Co. vs. Miller, 145 Ga. 90, 91 (c).

Teautonio Club vs. Howard, 141 Ga. 79 (2).

Writs of error will only lie from this Court to review "a final judgment or decree from the highest court of the State in which a decision in a suit can be had."

Judicial Code, Section 237.

Missouri K. & I. R. Co. vs. Olathe, 222 U. S. 185.

As to what is a final judgment or decree to which a writ of error will lie; see

Haseltine vs. Central National Bank, 183 U. S. 130;

Clark vs. Kansas City, 172 U. S. 334;

Schlosser vs. Hemphill, 198 U. S. 173;

Chesapeake R. Co. vs. McCabe, 213 U. S. 207.

In Georgia even a verdict not followed by a judgment entered thereon is not res adjudicata.

Walden vs. Walden, 124 Ga. 145, 146.

II

JUDGMENT IN MANDAMUS CASE IS NOT RES ADJUDICATA OR ESTOPPEL.

The contention of defendant in error (pages 61-67 of its brief) is untenable in law and in fact.

The mandamus case was one brought by the Georgia Railway & Power Company against the Railroad Commission of Georgia to compel the Commission to fix street rail-

way fares, under and by virtue of the Acts of 1907. It was not an equitable suit (page 67 of brief of defendant in error).

In Georgia such action is one strictly on the common law side of the court.

Gay vs. Gilmore, 76 Ga. 725.

Wheeler vs. Walker, 55 Ga. 258, 259.

The parties to the case at bar and in the mandamus case are not the same.

The contentions made and the questions raised are essentially different. Some of the contentions in the case at bar which were not raised in the mandamus case are (a) whether certain State and Federal constitutional provisions prevented the claimed contract sued upon from being enforceable as a contract; (b) whether the claimed rate contract was at will and terminated by timely notice; (c) whether the street railway company had power or authority to enter into binding rate contracts; (d) whether the claimed contract was or is discriminatory and therefore illegal and unconstitutional; (e) whether the claimed contract is a contract to fix fares without the limits of the municipality; (f) whether the claimed contract, by subsequent legislative acts, was extended to territory taken into the municipal limits of Decatur; (g) the confiscatory character of the claimed contract in connection with the orders of the Commission increasing service and requiring transfers; (h) if a rate contract existed—whether it and other contracts with DeKalb County were unconstitutionally impaired by subsequent orders of the Railroad Commission of Georgia and subsequent legislative acts; (i) the right of the Street Railway Company under the 14th Amendment to the Constitution of the United States to cease all operations of the Main Decatur line within the

territory of Decatur; (j) whether the Act of 1907 and its amendments as construed by the Court rendered said act unconstitutional.

The right to review the mandamus suit was granted in the case at bar, and is not res adjudicata.

III.

FEDERAL QUESTIONS NECESSARILY INVOLVED IN DECISION OF STATE COURT.

The defendant in error contends that the decision of the State Court "is based upon the want of authority of the Georgia Railway & Power Company to fix fares under the Constitution and Statutes of Georgia," a non-federal question. (Pages 12-14 of its brief.)

If the Constitution of the State of Georgia forbids a street railway company from fixing fares it must necessarily follow that a street railway company could not enter into a binding rate contract. (See former brief of plaintiffs in error, pages 29-31.)

The case at bar was instituted by defendant in error upon a claimed contract fixing a 5 cents rate of fare. If no contract for fares existed the rate of fare sought to be continued by injunction was confiscatory and attacked as violative of the 14th Amendment of the Constitution of the United States (a federal question).

The verdict of the jury (directed by the Court), the final judgment and decree make the 5 cents rate of fare applicable to territory taken into the municipal limits of Decatur by subsequent Legislative Acts (Acts 1914 and 1916). The verdict, judgment and decree gave force and effect to these acts. The Federal question is raised whether these acts, as

thus construed and enforced, unconstitutionally impaired the claimed contract sued upon, and other contracts of the street railway companies with the County of DeKalb.

Columbia Ry. Gas & Elec. Co. vs. S. C., decided by this Court Feb. 19, 1923 (No. 297) Co-Operative Advance Sheets March 15, 1923, page 289.

See also former brief of plaintiffs in error, pages 23, 24, 29 and 50.

Other Federal questions raised and passed upon by the judgment on the demurrers and the decree are discussed in the main brief of Plaintiffs in Error.

IV.

CONSTITUTION OF GEORGIA DOES NOT GIVE MUNICIPALITIES POWER TO MAKE RATE CONTRACTS.

Defendant in error contends that authority to enter into a rate contract is derived from the State Constitution (brief of defendant in error, pages 22-36).

Quoting defendant in error's brief (page 36) "The Town of Decatur * * * (in entering into the 5 cents fare contract) was not acting under the authority of the legislature, but independently of the legislature, and under the Constitution itself."

The Constitutional provision referred to, Georgia Code Section 6448 provides:

"The General Assembly shall not authorize the construction of any street passenger railway within the limits of

any incorporated town or city, without the consent of the corporate authorities."

It confers no authority upon a municipality to enter into rate contracts. A constitutional grant of authority cannot be limited, modified or destroyed by subsequent legislative action.

That the Legislature of the State of Georgia can at any time it sees fit change the rates in question, admitted repeatedly by defendant in error in their brief, (pages 26, 27, 39 and 97 of their brief) conclusively shows that a municipality has no contractural authority to enter into rate contracts.

The constitutional provision in question does not confer authority upon municipalities subject to subsequent legislative action. It is either an absolute grant of power to contract as to rates or none whatever is conferred thereby. As it is admitted that the legislature has supreme power over rates, there is no constitutional grant to municipalities with reference thereto.

All the courts in the construction of such provisions hold that they cannot be appealed to by municipalities as authority to legislate or contract as to rates. They are merely a limitation upon the power of the Legislature.

City of Mitchell vs. Board of R. R. Com., 184 N. W. 246;

Hayne vs. Chicago & O. P. Elev. Co., 128 N. E. 587;

Southwest Missouri R. Co. vs. Public Service Com., 219 S. W. 380;

Virginia Western P. Co. vs. Clifton Forge, 99 S. E. 732.

See also Knoxville Gas Co. vs. City of Knoxville (Circuit Court of appeals Sixth Circuit) 261 Fed. Rep. 283.

The constitutional provisions in the cases above cited contain provisions both as to construction and operation and some provide that the consent shall be upon such terms and conditions as may seem proper to local authorities. The Georgia constitutional consent provision is confined to **construction** alone.

This constitutional provision cannot be appealed to as giving the municipality authority to contract as to rates outside of and beyond its territorial limits.

City of Pasadena vs. Los Angeles Terminal Co., 41 Pac. 1093;

Koehn vs. Public Service Com., 176 N. Y. Supp. 147;

City of Arcata vs. Green, 106 Pac. 86.

Galveston & W. Ry. Co. vs. Galveston, 39 S. W. 920.

Defendant in error also, as it must, concedes that in Georgia a municipality has no power or authority to regulate rates, (brief of defendant in error, pages 38-39) "regulation under the Constitution of Georgia is lodged **solely** in the Legislature or by delegation in its agent the Railroad Commission," (page 38) * * * "Furthermore, a City in Georgia cannot by contract fix a rate irrevocable by the State, since under the Constitution of Georgia the power to regulate rates is lodged in the General Assembly and the exercise of the police power of the State shall never be abridged." (Page 39.)

These admissions negative any power on the part of the municipality to contract as to rates.

In Horkan vs. City of Moultrie, 136 Ga. 561, 563, the Court in passing upon the question whether municipalities had the right to enter into rate contracts said, "If this could not be done by ordinance, of course it could not be done by contract."

This Court has repeatedly held that for a municipality to contract as to rates it must show express authority therefor and that such power must be more explicitly conferred than the right to regulate and states the reason for such rule.

Home Tel. Co. vs. Los Angeles, 211 U. S. 265, 273;

Milwaukee Elec. R. & Light Co. vs. Railroad Commission, 238 U. S. 174.

It is a primary rule that cities can exercise no power that has been by statute or constitution reserved to the State.

Defendant in error admits that the Constitution of the State of Georgia reserves to the State and has lodged in the Legislature of the State, the sole and exclusive power to regulate rates.

It is further admitted that the police provision of the Georgia Constitution bars the State itself from making a rate contract.

The State itself cannot make a rate contract. All the power of a municipality is drawn from the State through its Legislature. If the State itself cannot make rate contracts, then surely it cannot grant what it does not have to cities.

In support of its contention defendant in error says that a municipality's right to enter into rate contracts is analogous to the right of a State to legislate upon matters of interstate commerce until Congress itself has legislated

with reference thereto. (Defendant in error's brief, page 34.)

Such contention overlooks the distinction between the inherent sovereign power of a State and the delegated authority of the United States and the further well recognized legal principle that municipalities possess **only** such powers as are explicitly granted them by the State or are **necessarily** implied from those granted.

Collins vs. Mayor, 69 Ga. 542.

Lofton vs. Collins, 117 Ga. 434 (438).

Walker vs. McNelly, et al., 121 Ga. 114.

Lockwood vs. Muhlberg, 124 Ga. 662.

Frank vs. City of Atlanta, 72 Ga. 428.

Mayor, et al., vs. Wilson & Gibson, 49 Ga. 476.

The failure of the Legislature of Georgia to grant the Municipality the right to regulate or contract as to rates, is equivalent to a denial of such municipal power.

Ottumwa Ry. & Light Co. vs. City of Ottumwa, 178 N. W. 905, where the decisions of this and other Courts on this subject are cited and collected.

Defendant in error refers to Section 2600 of the Code of Georgia (brief page 22). The provision contained in such Section; street railway "shall be subject to all just and reasonable rules and regulations by the corporate authorities," cannot be looked to as giving a municipality any power or authority to make rate contracts. The words used are not such as are used in granting contractual power. This provision does not undertake to give cities or towns any new power, contractual or otherwise, which had not otherwise been conferred by the legislature. It simply reserves the right to impose reasonable operative rules.

V.

NO ESTOPPEL ON QUESTION OF WANT OF AUTHORITY OF STREET RAILWAY COMPANY AND MUNICIPALITY TO ENTER INTO CLAIMED RATE CONTRACTS.

If no authority to contract as to rates has been delegated to the muncipalities or the street railway companies the claimed rate contract cannot be upheld by estoppel.

The rule with reference to estoppel is stated by this Court in the case of Central Transfer Co. vs. Pullman Car Co., 139 U. S. 60.

See also

Thomas vs. United States, 101 U. S. 71 (4).
Armour Packing Co. vs. United States, 209 U. S., page 56.

To the same effect see the following Georgia cases:

Macon Consolidated Street Railroad Co. vs. Mayor and Council of the City of Macon, 112 Ga. 782.
Town of Wadley vs. Lancaster, 124 Ga. 354.
Horkan vs. City of Moultrie, 136 Ga. 561.
Neal vs. Town of Decatur, 142 Ga. 205.
Wright, Executor vs. Pelham & Havanna R. Co., 18 Ga. App. 195.

Respectfully submitted,

L. Z. ROSSER,

J. PRINCE WEBSTER,

WALTER T. COLQUITT,

Attorneys for Plaintiffs in Error and Petitioners in Certiorari.

Atlanta, Ga.